No. 13056

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

A. PAUL OLINGER and RUTH HUFFMAN,

Appellants,

vs.

FRANK H. PARTRIDGE, Brigadier General, United States of America, Commanding General, Camp Roberts, California,

Appellee.

APPELLEE'S BRIEF.

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IN THE

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APPELLEE'S BRIEF.

Jurisdiction.

This is a habeas corpus proceeding before United States District Judge Harry C. Westover, whose final order shall be subject to review on appeal by the Court of Appeals for the Circuit where the proceeding is had. (28 U. S. Code, Sec. 2253.)

Statement of Facts.

Appellant was classified 1-A by Local Selective Service Board No. 126, Long Beach, California, on October 8, 1948. On October 11, 1948, Selective Service System Form No. 110 was mailed to said appellant, advising him that he had been classified 1-A and further notifying him

of his right to appeal said classification. [Tr. pp. 13, 14, 16, 22 and 23.] During the years 1948 and 1949 appellant made no effort to appear and discuss his classification with the draft board, to present new information, or to discuss his classification on the basis of information already on file. [Tr. p. 14.] Appellant did not take any appeal nor file any oral or written request for personal appearance before the local board [Tr. p. 19], nor did he submit any facts or new information, which, if true, would justify a change in his classification. No request for occupational deferment by any employer of registrant has ever been made. [Tr. pp. 19 and 20.]

After appellant was notified to report for physical examination in August of 1950, appellant first appeared personally at the local board. [Tr. p. 19.]

Appellant failed to report for his physical examination on August 15, 1950, and failed to report for his induction on September 18, 1950. [Tr. pp. 19 and 20.]

After appellant was contacted by an agent of the Federal Bureau of Investigation, arrangements were made to process said appellant as a delinquent, and on February 6, 1951, appellant was inducted into the Army of the United States. [Tr. p. 21.]

The matter came on regularly for hearing on an order to show cause on a writ of habeas corpus why a writ should not issue on April 16, 1951, and on June 4, 1951, the Honorable Harry C. Westover, Judge of the United States District Court, dismissed said petition for a writ of habeas corpus for lack of jurisdiction.

Question Presented on Appeal.

May the District Court review the legality of appellant's classification and induction where the appellant, during the lapse of almost two years between the date of his classification and the date of his induction, has taken no appeal, has made no timely request for personal appearance, nor any proper administrative act seeking a review of his classification?

To state the question in another way, may a registrant who, having been classified and selected for service and training, has exhausted none of the remedies allowed him under the Act and has undergone induction into the military service, by habeas corpus proceeding obtain a judicial determination of the legality of his induction?

ARGUMENT.

1. Appellant Having Failed to Exhaust His Administrative Remedies Within the Selective Service Act May Not Now Seek a Judicial Review of the Action of the Board.

Appellant in his opening brief, at page 9, has conceded that he failed to take any of the administrative appeals provided by the Selective Service Act and the regulations issued pursuant thereto.

It is a fundamental rule of law that administrative remedies must be exhausted before judicial review will be permitted, and with regard to the Selective Service Act it is fundamental that for habeas corpus to lie it must first appear that the registrant has exhausted his administrative remedies under the Act.

This specific point has been decided directly many times, and the leading case in support of this rule is that of *Johnson v. United States,* 126 F. 2d 242, 8 Cir. 1942, wherein the Court states, at page 247:

> "* * * Courts can prevent arbitrary action of such agencies from being effective. But a registrant cannot come to a court for such relief until he has exhausted all available and sufficient administrative remedies for such arbitrary action. Appellant has not availed himself of such corrective administrative relief. He has no standing in a court to complain and the court cannot examine the arbitrariness of his classification by the local board."

The Sixth Circuit Court of Appeals, in 1942, in *Rase v. United States,* 129 F. 2d 204, cites the *Johnson* case with approval. And the Ninth Circuit, in *Crutchfield v. United States,* 142 F. 2d 170, at page 174, (1943), in an Opinion by Judge Wilbur, quotes with approval the language from *Johnson v. United States, supra,* quoted above.

The case of *McLenigan v. Grymes,* 59 F. Supp. 846, is cited as authority for the holding that if habeas corpus is to lie in favor of Army inductee seeking release from the Army on the ground of the local board's lack of jurisdiction over him, it must appear that he has exhausted his administrative remedies under the Selective Service Act. The Court states, at page 847:

> "* * * Well over four years passed between the date of petitioner's registration and the date of his induction and there is no record or evidence of any appeal to the Selective Service Board of Appeal or objection to the jurisdiction of Local Board No. 8 in Baltimore until March 1945, when this Court was requested to intervene. It is fundamental that for habeas corpus to lie 'it must first appear that the registrant has exhausted his administrative remedies under the Act.' * * *"

The *Rase* and *Johnson* cases, *supra,* are cited with approval.

And the case of *Cox v. Fredericks, et al.,* 90 F. Supp. 55, 9 Cir. 1950, is in accord, and the Court therein states, at page 58:

> "* * * It has been pointed out in previous decisions that before a draftee may attack the validity of an induction order he must exhaust his admin-

istrative remedies, that is, he must take the appeals provided for either by the statute or regulations. * * *"

The Selective Service Act of 1948 states:

"If a registrant or any other person concerned fails to claim and exercise any right or privilege within the required time, he shall be deemed to have waived the right or privilege."

Sec. 10, Pub. Law 759, 80 Cong., (Title 32 C. F. R., Sec. 1641.2(b).

Supporting this regulation is the decision of Judge Swan of the Second Circuit in the case of *United States ex rel. La Charity v. Commanding Officer,* 142 F. 2d 381, (1944), at page 382, whose ruling, while applying to the Selective Training and Service Act of 1940, is equally applicable in the instant case.

It is obvious, therefore, that a prerequisite to seeking a writ of habeas corpus, to review within the strict limitations laid down, the legality of the acts of a Selective Service Board, is exhaustion of the administrative remedies provided for by the statute or regulations, and appellant having failed to exhaust his administrative remedies—in fact having waived the right to do so, the Court is without jurisdiction to hear the petition for a writ.

That this rule is general appears from the language universally used in cases pertaining thereto (though not deciding this specific point). For example, in *United States v. Commanding Officer,* 58 F. Supp. 933 (1945), the Court states, at page 939:

"* * * a registrant who, having been classified and selected for service and training, *has exhausted*

> *the remedies allowed him under the act* and has undergone induction into the military service, may, by appropriate Habeas Corpus proceedings, obtain a judicial determination of the legality of his induction * * *." (Emphasis added.)

Again, in the same case, the Court uses the following language at page 939:

> "In the instant case it is manifest, and unquestioned, that the complainant seasonably exhausted the remedies accorded to him under the Selective Training and Service Act of 1940, as amended; that he appealed from his classification by the local board to the board of appeals, * * *"

It is further interesting to note that in each of the cases cited by the appellant in his opening brief, on page 11, that each of the registrants in the *Falbo, Billings, Estep, Gibson* and *Downer* cases exhausted their administrative remedies *within* the Selective Service Act. The language of the Supreme Court in *Estep v. United States*, 327 U. S. 114, at page 115, is significant. The Court states:

> "* * * We found no provision for judicial review of a registrant's classification prior to the time when he *had taken all the steps in the selective process* AND *had been finally accepted by the armed services.* * * *" (Emphasis added.)

You will note that the Court uses the conjunctive "and," making it amply clear that induction into the armed services is a separate step which does not eliminate the necessity of having "taken all the steps in the selective process."

We have no quarrel with appellant's citation on page 11 of his opening brief from *Billings v. Truesdell,* 321 U. S. 542, where, at page 558, in the Opinion of Mr. Justice Douglas, it is stated:

> "* * * Moreover, it should be remembered that he who reports at the induction station is following procedure outlined in the *Falbo* case for the exhaustion of his administrative remedies. Unless he follows that procedure he may not challenge the legality of his classification in the courts. * * *"

Note that Mr. *Billings* took all the appeals provided for in the Selective Service Act. Note, too, that the Court, in referring to administrative remedies, uses "remedies" in its plural form.

Falbo v. United States, 320 U. S. 549, cited by appellant, also contains significant language at page 552:

> "* * * Selection of registrants for service, *and deferments or exemptions from service,* are to be effected *within the framework* of this machinery as implemented by rules and regulations prescribed by the President. * * *" (Emphasis added.)

It may be said, then, that Congress did not intend that the Courts should grant exemptions and deferments, but that it should be effected "within the framework" of the Selective Service Act. It would thus appear that the appellant desired that the Courts should determine his right to deferment rather than the lawfully constituted administrative body and, hence, he has attempted to by-pass

the machinery "within the framework" to seek his exemption from military service.

Appellant, however, contends that the mere induction satisfies questions of exhaustion of Selective Service procedure, but appellant has pointed to no case where the Court has reviewed the legality of the classification of an inducted registrant wherein all administrative appeals within the Act were not taken.

How necessary it is to have taken the appeals provided for by the Act, if one is to complain of the action of the board, is demonstrated by the language of Mr. Justice Rutledge in his concurring opinion in *Falbo v. United States, supra,* at page 555, wherein he states:

> "* * * Petitioner claims the local board's order of classification was invalid because that board refused to classify petitioner as a minister on the basis of an antipathy to the religious sect of which he is a member. And, if the question were open, the record discloses that some evidence tendered to sustain this charge was excluded in the trial court. *But petitioner has made no such charge concerning the action of the appeal board which reviewed and affirmed the local board's order.* And there is nothing to show that the appeal board acted otherwise than according to law. *If therefore the local board's order was invalid originally for the reason claimed,* as to which I express no opinion, *whatever defect may have existed was cured by the appeal board's action.* * * *" (Emphasis added.)

That the exhaustion of administrative remedies means actually taking the appeals provided for by the Act is further evident from the language of the Supreme Court in the case of *Sunal v. Large,* 332 U. S. 174, (1947), in which Mr. Justice Douglas states, at page 175:

> "* * * The local boards, after proceedings unnecessary to relate here, denied the claimed exemptions and classified these registrants as 1-A. *They exhausted their administrative remedies but were unable to effect a* change in their classification. * * *" (Emphasis added.)

In the *Sunal* case, *supra,* the appellants sought a writ of habeas corpus instead of appealing from conviction by the trial court for refusing to submit for induction. The Court states at page 181:

> "* * * But since they chose not to pursue the remedy which they had, we do not think they should not be allowed to justify their failure by saying they deemed any appeal futile."

This language is readily applicable to appellant's position in the instant case.

Of the cases cited by the appellant on page 14 in his opening brief, your appellee finds none that is in point. *Koepke v. Fontecchio,* 177 F. 2d 125, holds at page 128 that plaintiff could maintain action for declaratory judgment *as no administrative remedy was provided under the Act.*

Skinner & Eddy Corp. v. United States, 249 U. S. 557, is an injunction suit seeking to enjoin the enforcement of an order which the plaintiffs contend the Interstate Commerce Commission had no statutory authority to issue, and *American School of Magnetic Healing v. McAnnulty,* 187 U. S. 94, is another injunction suit wherein no administrative appeal was provided. *Gegiow v. Uhl,* 239 U. S. 3, is an immigration case which had been administratively appealed, while *Stark v. Wickard,* 321 U. S. 288, distinguishes itself by the following quotation at page 309:

> "* * * Here, there is no forum, other than the ordinary courts, to hear this complaint. When, as we have previously concluded in this opinion, definite personal rights are created by federal statute, similar in kind to those customarily treated in courts of law, the silence of Congress as to judicial review is, *at any rate in the absence of an administrative remedy,* not to be construed as a denial of authority to the aggrieved person to seek appropriate relief in the federal courts in the exercise of their general jurisdiction. * * *" (Emphasis added.)

2. Answering Contentions of Appellant Concerning Provisions of 46 U. S. C. A. Section 225.

Appellant throughout his brief has placed great reliance upon the provisions of 46 U. S. C. A., Section 225, which states:

> "No * * * engineer of steam vessels, licensed under this chapter shall be liable to draft in *time of war* except for the performance of duties such as required by his license; * * *" (Emphasis added.)

Appellant states that his being drafted in face of this Section is such unlawful and arbitrary action upon the part of the board that it eliminates the necessity of his having taken appeals administratively and renders the matter one immediately qualified for judicial review by reason of the board having exceeded its statutory powers. Appellee contends that the District Court could and probably did take judicial notice of the fact that 46 U. S. C. A. Section 225, was specifically repealed by a joint resolution of Congress on July 25, 1947, (61 Stat. 451), which states:

> "In the interpretation of the following statutory provisions [referring specifically to 46 U. S. C. A., Section 225], the date when this joint resolution becomes effective shall be deemed to be the date of the termination of any state of war heretofore declared by the Congress of the National Emergency proclaimed by the President on September 8, 1939, and May 27, 1941."

Congress thereby evidences its intent that said Section apply *only in time of war* in accordance with a reasonable

reading of the language thereof, and further has by a joint resolution declared that as far as that statute is concerned the *war is terminated.*

And, going one step further, the Selective Service Act of 1948 specifically states that "except as provided in this Title, all laws and parts of laws in conflict with the provisions of this Title are hereby suspended to the extent of such conflict for the period in which this Title shall be in force." 62 Stat. 625, amended June 23, 1950, 64 Stat. 254-318, (50 U. S. C. A. Supp., 467). The above quoted section becomes even more pertinent in view of Section 4 of the Selective Service Act of 1948, which states, in effect, that except as otherwise provided in this Title, every male citizen of the United States who is between the ages of nineteen and twenty-six at the time fixed for his registration, shall be liable for training and service in the armed forces of the United States. Since there is nothing in the Act exempting licensed engineers in the merchant marine, it follows that Section 4 by implication repeals the Section in Title 46, referred to above. Hence, the statute upon which registrant relies to indicate to the Court that the draft board has exceeded its jurisdiction and, hence, appellant should be given a judicial review of his classification, has been (1) in effect, repealed, and (2) superseded, and as to how far an Act of Congress may go in superseding the previous Act, the cases have held that even in the case of a treaty with Indian nations wherein the treaty stated that the Indians would not be subject to call for military service, the Draft Act of 1940 superseded these treaties.

Totus v. United States, 39 F. Supp. 7, 11;

United States v. Claus, 63 F. Supp. 433, 434.

3. Summary.

Thus, we have two facets to the case, neither of which the District Court felt warranted the taking of jurisdiction. (1) the allegations in the petition for a writ, alleging lack of due process and arbitrary and capricious action on the part of the board, which is not subject to judicial review by reason of the appellant's failure to take the administrative remedies open to him, and (2) the reliance by appellant upon 46 U. S. C. A., Section 225, to show that the board exceeded its authority in drafting the appellant in the face of said Section, where it appears upon the face of appellant's petition that he relies upon a statute that has been (a) repealed and (b) superseded.

Conclusion.

In view of the foregoing, it is respectfully submitted that should this Court determine that the District Court had jurisdiction to judicially review the appellant's classification, then the false premise upon which the appellant relies, to wit, 46 U. S. C. A.. Section 225, will not alter the ultimate result achieved by the District Court's dismissal of the petition for a writ of habeas corpus, and it is, therefore, urged that the judgment of the District Court be affirmed.

Respectfully submitted,

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